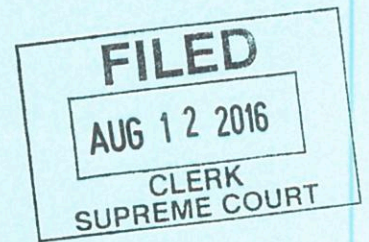


COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
2015-SC-000570
COURT OF APPEALS CASE NO. 2015-CA-000886-DD



DENNIS CHAMPION

APPELLANT

VS.

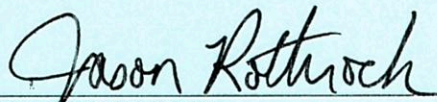
BRIEF FOR APPELLEE

COMMONWEALTH OF KENTUCKY

APPELLEE

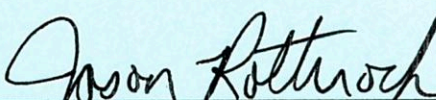
**APPEAL FROM FAYETTE CIRCUIT COURT
15-XX-00006, HON. KIMBERLY BUNNELL**

Respectfully submitted,
LARRY S. ROBERTS
FAYETTE COUNTY ATTORNEY
201 E. MAIN ST., SIXTH FLOOR
Lexington, KY 40507
(859) 254-4941

BY: 
JASON ROTHROCK
ASSISTANT FAYETTE COUNTY
ATTORNEY

CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing document was executed and served by mailing first class prepaid postage to the following on August 11, 2016: Hon. Linda Roberts Horsman, Department of Public Advocacy, 5 Mill Creek Park, Section 100, Frankfort, KY 40601; Hon. Andy Beshear, Office of Criminal Appeals, 1024 Capital Center Dr., Frankfort, KY 40601; Hon. William E. Sharp, ACLU of Kentucky, 315 Guthrie St., Ste. 300, Louisville, KY 40202; and Hon. Carmen Ross, 163 W. Short St. Ste. 300, Lexington, KY 40507; and was served by hand-delivery to the following on August 11, 2016: Hon. Kimberly Bunnell, Fayette Circuit Court Judge, Hon. Joseph T. Bouvier, Fayette District Court Judge, Hon. Ray Larson, Fayette Commonwealth's Attorney., and Hon. Janet Graham, LFUCG Department of Law. I further certify that the record on appeal was not withdrawn by the Appellee.


JASON ROTHROCK
ATTORNEY FOR APPELLEE

STATEMENT CONCERNING ORAL ARGUMENT

Appellee does not believe oral argument is necessary to assist the Court in deciding the issues presented, but Appellee will gladly appear at the pleasure of the Court.

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COUNTERSTATEMENT OF THE FACTS

On December 8, 2014, at 4:57 p.m., a Lexington police officer observed Appellant at the intersection of Georgetown Road and New Circle Road. According to the Uniform Citation, Appellant was observed “soliciting/begging for alms. Suspect had a homemade sign stating begging for alms.” Appellant was cited to Fayette District Court for a violation of Lexington-Fayette Urban County Government (“LFUCG”) Ordinance 14-5. Appellant failed to appear for arraignment on January 27, 2015, and a warrant was issued for his arrest. Appellant was arrested and was arraigned from the Fayette jail by video on January 30, 2015. At arraignment, Appellant was offered three days with credit for time served if he would plead guilty. The District Court Judge allowed Appellant to enter a conditional guilty plea. Appellant filed a timely appeal in Fayette Circuit Court. The Fayette Circuit Court affirmed the conviction. Appellant sought and was denied discretionary review by the Kentucky Court of Appeals. Appellant then sought and was granted discretionary review by this Court.

ARGUMENT

I. ORDINANCE 14-5 IS AUTHORIZED PURSUANT TO WELL-ESTABLISHED RULES OF STATUTORY CONSTRUCTION.

Lexington-Fayette Urban County Government (“LFUCG”) Ordinance 14-5 states as follows:

- (a) No person shall beg or solicit upon the public streets or at the intersection of said public streets within the urban county area.
- (b) Any person who violates any provision of this section shall be fined not less than fifty dollars (\$50.00) nor more than one hundred dollars (\$100.00) or be imprisoned for not less than ten (10) days nor more than thirty (30) days or both for each offense.

KRS 83A.065(2) grants Kentucky cities the authority to make the violation of their ordinances a misdemeanor, punishable by criminal fine, imprisonment, or both. That authority is extended to the LFUCG by KRS 67A.060, which grants urban-county governments the authority to exercise the statutory rights of highest class cities within their borders.

Appellant argues that KRS 83A.065 is contradicted by KRS 500.020, which states:

- (1) Common law offenses are abolished and no act or omission shall constitute a criminal offense unless designated a crime or violation under this code or another statute of this state.
- (2) This provision shall not affect the power of a court to punish for contempt or to employ any sanction authorized by law for the enforcement of an order or a civil judgment or decree.

Well-established rules of statutory construction validate KRS 83A.065 and LFUCG Ordinance 14-5. The Fayette Circuit Court correctly followed these rules in affirming Appellant's conviction. According to *City of Bowling Green v. Bd. of Educ. of Bowling Green Indep. Sch. Dist.*, 443 S.W.2d 243, 247 (Ky. 1969):

These rules are: (1) That it is the duty of the court to ascertain the purpose of the General Assembly, and to give effect to the legislative purpose if it can be ascertained; (2) that conflicting Acts should be considered together and harmonized, if possible, so as to give proper effect and meaning to each of them; and (3) that as between legislation of a broad and general nature on the one hand, and legislation dealing minutely with a specific matter on the other hand—the specific shall prevail over the general.

The Fayette Circuit Court correctly found that the legislative intent of KRS 500.020 was “to abolish common law crimes, crimes created not by statute but by judicial precedent.” Opinion and Order, page 3. The Fayette Circuit Court also correctly found that KRS 500.020 and KRS 83A.065 can be read in harmony.

KRS 83A.065 in no way reverses KRS 500.020's ban on common law crimes. Under KRS 83A.065, if a city wishes to assign a criminal penalty to an ordinance, it must explicitly communicate that intention in the ordinance itself, fulfilling the notice requirement that common law crimes failed to achieve. In passing 83A.065, the General Assembly acted in conformity with 500.020.

Opinion and Order, page 4.

The Fayette Circuit Court also found that “[e]ven if the two statutes could not be applied together, the narrower, more specific statute, would prevail over 500.020, a broad prohibition on crimes not created by statute.” Opinion and Order, page 4. KRS 83A.065 is clearly a very specific statute, whereas KRS 500.020 is more general.

Justices Cunningham, Noble, and Venters raise concerns about this statutory scheme in the concurring opinions in *Johnson v. Commonwealth*, 449 S.W.3d 350 (Ky. 2014). In *Johnson*, the defendant was convicted under a Jefferson County dangerous dog ordinance. The defendant's mother took the defendant's dog for a walk, and the dog attacked another dog. The defendant was not present when this happened, yet she was convicted and received a 90 day conditionally discharged sentence.

While this conviction and sentence might seem to be an injustice, one bad result is not a reason to strike down a validly enacted statute and ordinance. Furthermore, a defendant in a city ordinance case enjoys the same due process rights and protections as a defendant accused of violating a criminal statute enacted by the General Assembly. The defendant in a city ordinance case has the presumption of innocence, the right to a trial, the right to confront and cross-examine witnesses, the right to call witnesses on his or her behalf, the right to testify or not testify, and the right to appeal a guilty verdict. Last but not least, the burden of proof is on the prosecution to prove the all elements beyond a reasonable doubt.

While there is a risk that unusual ordinances may be on the books from city to city across the Commonwealth, the legislature no doubt understood the need for individual cities to have the authority to criminalize certain problem behavior specific to that city when it enacted KRS 83A.065. A problem that might be of great concern to residents of Pikeville might be of no concern to residents in Paducah, and the Pikeville problem might get no traction at all at the General Assembly. In other words, the General Assembly might be unable or unwilling to address Pikeville's problem, but the General Assembly is willing to allow Pikeville to solve its own problem through a city ordinance with no benefit or detriment to the residents of Paducah.

Appellant also criticizes the ordinance in question because it "fails to nominate whether violations of its terms will be considered a misdemeanor or a violation, required by the plain language of the granting statute." Appellant's Brief, page 4. Appellee concedes that this ordinance, and all local criminal ordinances, should specify whether they are misdemeanors or violations; however, the failure to specify should not be fatal. LFUCG Ordinance 14-5 is clearly not a violation, because the penalty includes an option of incarceration. It is therefore not more than a Class B misdemeanor.

II. EVEN IF ORDINANCE 14-5 IS CONTENT BASED, IT SURVIVES STRICT SCRUTINY BECAUSE IT SERVES A COMPELLING GOVERNMENT INTEREST AND IT IS NARROWLY TAILORED.

The Fayette Circuit Court did not have the benefit of the United States Supreme Court's decision in *Reed v. Town of Gilbert, Ariz.*, 135 S.Ct. 2218 (2015), when it affirmed Appellant's conviction. In light of *Reed*, Appellee concedes that, LFUCG Ordinance 14-5 is content based. It prohibits begging and soliciting, but it does not prohibit other types of speech. For example, street performers could step onto streets and

sing songs or perform skits for motorists stopped at red lights, simply for the motorists' amusement and with no financial motive. Such artistic speech would not be prohibited by the statute, whereas begging and soliciting are prohibited.

The United States Supreme Court stated in *Reed*:

Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. This commonsense meaning of the phrase "content based" requires a court to consider whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys. Some facial distinctions are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both distinctions are drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.

Reed at 2227, *internal citations omitted*.

Begging is a very specific category of speech, and soliciting, while more general, would seem to fall under the category of speech regulated by its function or purpose. As stated above, the ordinance seems to leave other forms of speech untouched, so the ordinance is content based.

To be constitutional, a law limiting content based speech must survive strict scrutiny. The government must "prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed* at 2231. The United States Supreme Court has "recognized the legitimacy of the government's interests in ensuring public safety and order [and] promoting the free flow of traffic on streets and sidewalks...." *McCullen v. Coakley*, 134 S.Ct. 2518, 2535 (2014).

The LFCUG has a compelling interest in regulating interaction between people on foot and people driving vehicles. The LFUCG has a compelling interest in pedestrians not being struck by motor vehicles, and it has a compelling interest in the efficient flow

of pedestrian and vehicular traffic. The intersection of two streets in downtown Lexington is not normally a place where pedestrians and motorists mingle, chat, exchange ideas, engage in commerce, or discuss religion and politics, unless, for instance, people have a permit to conduct a parade.

According to *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515 (1939):

Wherever title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

While Appellee does not dispute that a city street is public forum, the LFUCG has a compelling interest in regulating interaction between pedestrians and motorists upon the streets.

The conduct that needs to be prohibited is not standing on the sidewalk at the intersection holding a sign asking for money. The conduct that needs to be prohibited is stepping into the street to get money from the motorist and then walking in the street to the next car in line to get money from the next motorist, and so on. In addition to being dangerous for the pedestrian, it disrupts the safe and efficient flow of vehicular traffic. The motorist who is fifth in line waiting at a red light has a right to expect the four vehicles ahead of him or her to proceed when the light turns green. The fifth motorist should not have to wait for the four motorists in front of him to conduct business or have some type of personal interaction with a person on foot, regardless of what the personal interaction is. It could be an indigent person begging, it could be a teenager soliciting money for a church mission trip, it could be a Girl Scout selling cookies, it could be a

person handing out flyers in an effort to persuade the motorist to vote for a certain candidate, it could be a person selling newspapers, or it could be a person attempting to wash the motorist's windshield. All of these activities involve solicitation. They all involve potential danger to the person in the street and impede the safe and efficient flow of vehicular traffic.

If LFUCG Ordinance 14-5 does further compelling government interests, then it is difficult to imagine how it could be more narrowly tailored to achieve that interest. It seems unworkable to prohibit begging and soliciting in streets when the traffic light is green for the motorist, but to allow begging and soliciting when the light is red.

III. CONCLUSION

Ordinance 14-5 is valid pursuant to well-established rules of statutory construction. It is a narrowly tailored, content based prohibition of specific activity, and it serves a compelling government interest of promoting public safety and the efficient flow of vehicular traffic. For these reasons, Appellee respectfully requests that this Court affirm Appellant's conviction.

Respectfully submitted,

LARRY S. ROBERTS
FAYETTE COUNTY ATTORNEY

BY: 
JASON ROTHROCK
ASSISTANT FAYETTE COUNTY
ATTORNEY